Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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No. 90-992

STATE OF NEVADA ET AL., PETITIONERS

v.

JAMES D. WATKINS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION OF THE FEDERAL RESPONDENTS TO MOTION TO DEFER CONSIDERATION

The Solicitor General, on behalf of the Secretary of Energy and the Department of Energy, hereby opposes the Motion to Defer Consideration filed by the petitioners in this case. Petitioners, the State of Nevada and various officials and representatives of the State, seek review of a decision of the United States Court of Appeals for the Ninth Circuit that rejected their constitutional and statutory challenges to the implementation of the Nuclear Waste Policy Act, 43 U.S.C. 10101 et seq. Pet. App. 1-37. In that statute, Congress has directed the Department of Energy to characterize a site in Nevada known as Yucca Mountain as a potential location for a permanent underground nuclear waste

repository. 43 U.S.C. 10133(a). Petitioners seek to defer consideration of their petition for a writ of certiorari in this case until disposition of another petition, not yet filed, in a separate case brought by the State against the Bureau of Land Management, an agency of the Department of the Interior. That agency granted a right-of-way pursuant to the Federal Land Policy and Management Act, 43 U.S.C. 1761, which permits the Department of Energy to use public lands in the vicinity of Yucca Mountain for the site characterization program. The district court dismissed the State's complaint challenging the right-of-way for lack of standing, and the court of appeals affirmed. 918 F.2d 854 (1990) (copy attached). The Department of Energy is not a party to the latter case.

Although in each case the State is attempting to prevent the carrying out of site characterization activities, in this Court each case presents distinctly different issues. In the present case, No. 90-992, the State presents several direct challenges to the constitutionality of the Nuclear Waste Policy Act, as well as to the Department of Energy's implementation of the statute, all of which the court of appeals rejected on their merits. Pet. App. 13-37. In its complaint against the Bureau of Land Management, the State included some of these same claims, but the court of appeals decided only that the complaint had failed to allege any basis for satisfying the standing requirements of Article III. 918 F.2d at 855-858. There are no common questions, and thus nothing about the

relationship between the two cases that would warrant deferring disposition of the petition in No. 90-992.

Moreover, delay in the consideration of No. 90-992 will result in continued frustration of the Congressional mandate to characterize the Yucca Mountain site. In order to carry out this program, the Department of Energy must obtain permits from State agencies exercising delegated authority under the Clean Air Act, 42 U.S.C. 7401 et seq., and the Safe Drinking Water Act, 42 U.S.C. 300f et seq., as well as a permit to appropriate water for the project. The State's motion fails to mention the fact that the State has rejected the Department of Energy's permit applications solely because of the effect of three state legislative enactments purporting to make site characterization activities illegal under state law. Pet. App. 9-11. As a result, the United States filed suit more than a year ago in the United States District Court for the District of Nevada seeking an injunction requiring the State to process the applications. United States v. State of Nevada, No. CV-S-90-065-HDM. The United States argues that these state laws have been preempted by the Nuclear Waste Policy Act. This contention was subsequently sustained in the court of appeals decision under review in No. 90-992, which originated in the court of appeals as a separate proceeding.

In response to the repeated request of the State, the district court in United States v. State of Nevada, supra, first stayed proceedings pending the court of appeals decision, and now has stayed disposition of the United States' motion for summary

judgment pending the disposition of the petition for a writ of certiorari filed in No. 90-992 (Orders dated May 23, 1990, and December 14, 1990, copies attached). Any further delay in the disposition of the petition is significantly prejudicial to the ability of the Department of Energy to carry out the will of Congress.

CONCLUSION

For the reasons stated above, the motion to defer consideration should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

FEBRUARY 1991

the crime." *Runco*, 873 F.2d at 1232. Thus, there was sufficient evidence to support Hadley's conviction on count eight.

V

[12] Finally, Hadley contends that the district court erred by imposing a sentence not in accordance with the Sentencing Guidelines for his conviction on count seven. The district court did not apply the Sentencing Guidelines in imposing a 30-year sentence on that conviction. The court did follow the Sentencing Guidelines when it sentenced Hadley to nine years in prison on counts eight and nine.

Hadley's contention is without merit. We have held that the Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 2168, 109 L.Ed.2d 497 (1990). There is no dispute that the conduct underlying the count seven conviction occurred in October 1987, prior to the effective date of the Sentencing Guidelines. Thus, the district court did not err when it declined to apply the guidelines to count seven.

AFFIRMED.

STATE OF NEVADA,
Plaintiff-Appellant,

v.

Robert F. BURFORD, Director of Bureau of Land Management, Department of Interior; Edward F. Spang, Nevada State Director, Bureau of Land Management, Department of Interior, Defendants-Appellees.

No. 89-15272.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 16, 1990.

Decided Nov. 14, 1990.

State of Nevada brought action challenging Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository. The United States District Court for the District of Nevada, Philip M. Pro, J., dismissed action, 708 F.Supp. 289, and State appealed. The Court of Appeals, Wallace, Circuit Judge, held that Nevada failed to show that it would suffer concrete and immediate injury as result of grant of right-of-way, and did not have standing to challenge grant.

Affirmed.

1. Federal Courts ⇐557

Where district court has inadvertently neglected to dismiss action but it is clear it intended its order to terminate action, Court of Appeals treats action as dismissed.

2. Federal Courts ⇐555

Order which dismissed complaint but which did not dismiss underlying action was appealable, where it was clear that ruling by district court was meant to be dispositive of action. 28 U.S.C.A. §§ 1291, 1331.

3. Federal Civil Procedure ⇐103.1
Federal Courts ⇐12

"Case or controversy" limitation in article III of the Constitution requires that federal courts visit threshold question of standing in every federal case; in order to clear this jurisdictional hurdle, complaining party must demonstrate injury in fact. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Health and Environment ⇐25.15(4)

State of Nevada failed to show that it would suffer concrete and immediate injury as result of Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository, and did not have standing to challenge grant; land was owned by federal government, and State did not allege that it used site for

any purpose. Nuclear Waste Policy Act of 1982, § 2 et seq., as amended, 42 U.S.C.A. § 10101 et seq.; Federal Land Policy and Management Act of 1976, § 102 et seq., 43 U.S.C.A. § 1701 et seq.; National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; U.S.C.A. Const. Art. 3, § 1 et seq.

Harry W. Swainston, Deputy Atty. Gen., Carson City, Nev., for plaintiff-appellant.

George W. Vancleve, U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the District of Nevada.

Before WALLACE, ALARCON and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

[1, 2] Nevada appeals from the dismissal of its complaint against the Bureau of Land Management (Bureau), in which Nevada alleges that the Bureau improperly granted a right-of-way to the Department of Energy (Department) to conduct site characterization studies at Yucca Mountain, Nevada. The district court concluded that Nevada lacked standing to pursue this action, and dismissed the complaint. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Our court has no jurisdiction to review a dismissed complaint; a judgment is not final until the underlying action is dismissed. Where the district court has inadvertently neglected to dismiss the action but it is clear it intended its order to terminate the action, we treat the action as dismissed. *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 855–56 (9th Cir.1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1575, 94 L.Ed.2d 766 (1987). Here it is clear that the ruling by the district court was meant to be dispositive of the action. Therefore, we have jurisdiction over this timely appeal under 28 U.S.C. § 1291. We affirm.

I

In February of 1983, Nevada was notified that certain public lands near Yucca Mountain were under consideration as a national repository for the disposal of nuclear waste. Four years later, Congress decided to concentrate waste repository development efforts on the Yucca Mountain site. Accordingly, Congress amended the Nuclear Waste Policy Act (Waste Act), 42 U.S.C. §§ 10101–10270, to require that site characterization activities proceed solely at Yucca Mountain. *Id.* § 10133(a). Site characterization consists of extensive testing conducted by the Department in order to evaluate the suitability of a site for the location of a repository. *Id.* § 10101(21).

In order to aid the Department in its site characterization activities, the Waste Act provides,

> [t]o the extent that the taking of any action related to the site characterization of a site ... requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer.

42 U.S.C. § 10140(1) (emphasis added). Pursuant to this section, the Department applied to the Bureau in November 1987 for a right-of-way over public land near Yucca Mountain. This land is administered by the Bureau under the Federal Land Policy and Management Act of 1976 (Land Act), 43 U.S.C. §§ 1701–1784 which directs the Bureau to manage the land in a way "that will best meet the present and future needs of the American people." *Id.* § 1702(c). On January 6, 1988, the Bureau granted to the Department a 13 year right-of-way over 51,632 public acres near Yucca Mountain, and authorized the Department to undertake necessary site characterization activities on that land in accordance with the Department's Plan of Development.

Under this plan, the Department intends to excavate several exploratory shafts and conduct a variety of scientific tests. The

Department has stated that site characterization activities should not interfere with any current or planned activities on the lands within the right-of-way. It promises "to return lands disturbed by site characterization to a stable ecological state with a form and productivity similar to the predisturbance state." Moreover, the right-of-way granted by the Bureau prohibits the disposal of any hazardous materials on the land, and states that it "does not convey any rights for the construction or initial operation of a nuclear waste repository."

Nevada filed an action in the district court challenging the grant of this right-of-way. Nevada alleged that the grant violated requirements in both the Land Act and the National Environmental Policy Act (Environmental Act). In addition, it claimed that the Bureau's actions violated Nevada's constitutional right, including that the right-of-way rendered meaningless Nevada's political right to object to its selection as a waste repository site. The district court determined that Nevada lacked standing to pursue the action, and concluded that the constitutional claims were without merit.

II

We review de novo the district court's legal conclusion that Nevada lacks standing. *Bruce v. United States*, 759 F.2d 755, 758 (9th Cir.1985). Moreover, for purposes of this review, we must construe the complaint in favor of Nevada, and accept as true all of Nevada's material allegations. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

[3] The "case or controversy" limitation in article III of the Constitution requires that federal courts visit the "threshold question" of standing in every federal case. *Id.* at 498, 95 S.Ct. at 2205. In order to clear this jurisdictional hurdle, a complaining party must demonstrate an injury in fact. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473, 102 S.Ct. 752, 759, 70 L.Ed.2d 700 (1982) (*Valley Forge*). The Supreme Court has held that this constitutional injury requirement embraces three related elements: (1) an actual or threatened injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984) (*Allen*); *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758; *Alaska Fish & Wildlife Federation v. Dunkle*, 829 F.2d 933, 937 (9th Cir.1987), *cert. denied*, 485 U.S. 988, 108 S.Ct. 1290, 99 L.Ed.2d 501 (1988).

[4] To satisfy the first of these requirements, Nevada must show that it "has been or will in fact be perceptibly harmed by" the decision of the Bureau to grant the right-of-way. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973). Thus, Nevada must demonstrate that it has suffered or will in fact suffer "concrete and immediate" injury on account of the right-of-way grant. *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District*, 752 F.2d 373, 378 (9th Cir. 1985). This it has failed to do.

Nevada's complaint contains allegations that the Bureau's decision to issue the right-of-way violated several constitutional and statutory provisions. For example, Nevada contends that the Bureau violated requirements of the Land Act by issuing the right-of-way because in order to permit the Department to occupy the land surrounding Yucca Mountain, the Bureau was required to use the withdrawal procedure specified in 43 U.S.C. § 1714. Nevada further argues that the environmental assessment accepted by the Bureau in connection with the right-of-way grant is insufficient to satisfy the requirements imposed by the Environmental Act. In addition, Nevada contends that issuance of the right-of-way violates many constitutional provisions, including the tenth amendment.

However, the complaint is silent as to how these alleged violations have resulted in injury to Nevada. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone,

to confer jurisdiction on a federal court." *Allen*, 468 U.S. at 754, 104 S.Ct. at 3326; *see also Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). The federal government, not Nevada, owns the land in question. Moreover, Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose. Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada fails to show how those violations result in injury to Nevada. We agree with the district court that Nevada's claims merely "constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance" with federal laws. *Nevada v. Burford*, 708 F.Supp. 289, 295 (D.Nev.1989) (*Burford*). This is insufficient to demonstrate standing. *See Allen*, 468 U.S. at 754, 104 S.Ct. at 3326; *Valley Forge*, 454 U.S. at 482–83, 102 S.Ct. at 763–64; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n. 13, 94 S.Ct. 2925, 2933 n. 13, 41 L.Ed.2d 706 (1974).

In addition to contending that the right-of-way grant violated several federal statutes and the Constitution, Nevada asserts that its political right to object to its selection as the host for a nuclear waste repository has been rendered meaningless by the Bureau's action. It is clear that a state may demonstrate standing by asserting an injury to a sovereign interest. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601, 102 S.Ct. 3260, 3265, 73 L.Ed.2d 995 (1982) (*Snapp*). What constitutes a state's sovereign interest is not free from doubt. *Id.* But in this appeal, we need not analyze its nature or parameters. Nevada argues that one of its sovereign interests—the right to object in the political arena to the selection of Yucca Mountain as a waste repository—has been infringed. Assuming such an identifiable sovereign interest, Nevada's argument ignores the fact that the decision of whether to construct the repository at Yucca Mountain is many years and numerous procedural hurdles away. For example, if the Department determines that Yucca Mountain is an appropriate site after site characterization is completed, the Department must hold public hearings near the site to receive comments regarding its suitability. 42 U.S.C. § 10134(a). Following this, the Department must make a recommendation to the President whether to construct the repository, who in turn must decide whether to recommend the site to Congress. *Id.* Within 60 days of the President's recommendation to Congress, the state in which the recommended site is located may file a notice of disapproval with Congress. *Id.* § 10136(b)(2). If such a notice is filed, the site selection is disapproved unless Congress passes a resolution as required by the Waste Act within 90 days. *Id.* § 10135(c). We deal here only with the decision by the Bureau to grant a right-of-way, the only "direct consequence [of which] is that the site characterization process will proceed to the next step in accordance with the [Waste Act]." *Burford*, 708 F.Supp. at 297. Any claim by Nevada that site characterization will inevitably lead to the designation of Yucca Mountain as a repository site is mere speculation, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44, 96 S.Ct. 1917, 1927, 48 L.Ed.2d 450 (1976). Clearly, the right-of-way decision has not stripped Nevada of its right to participate in the site characterization process or of its right to object to the selection of Yucca Mountain as a repository. Thus, because Nevada has failed to show how it has been injured in this respect, its claim of standing based on its asserted sovereign interest fails.

In its complaint, Nevada also alleges that the site characterization process will disturb the surface and subsurface of the land in the affected area, and will interfere with other possible uses of the land. A state may, of course, have standing to redress injuries to its proprietary interests, such as the interests arising from property ownership. *Snapp*, 458 U.S. at 602–03, 102 S.Ct.

at 3266–67. As we have discussed above, however, Nevada does not own the affected property, nor has it alleged that it uses the property for any purpose. Thus, even assuming that the site characterization process will disturb the land, Nevada has failed to show that *it* will suffer on account of that disturbance. Proprietary standing is therefore not available to Nevada.

Finally, Nevada alleges that it has standing in its *parens patriae* capacity to advance the interests of its citizens. The Supreme Court has held that a state has a "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general," and can therefore sue to protect these interests through a *parens patriae* action. *Id.* at 607, 102 S.Ct. at 3268. In this case, Nevada alleges that the selection of Yucca Mountain as the site for a national waste repository will have a devastating effect on the state's vital tourist industry. Although the Supreme Court has endorsed *parens patriae* suits in general, it has also stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n. 16, 102 S.Ct. at 3270 n. 16 (stating that with respect to the citizens' rights in relation to the federal government, "it is the United States, and not the State, which represents them as *parens patriae*"). Our earlier case of *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1153 (9th Cir.), *cert. denied*, 423 U.S. 836, 96 S.Ct. 62, 46 L.Ed.2d 54 (1975), must, of course, give way to the Supreme Court's clear statement in *Snapp*.

Because Nevada has failed to allege sufficient facts to demonstrate standing, we affirm the district court's dismissal of the action. We therefore do not reach the question of whether the district court was correct in dismissing Nevada's claims on the merits.

AFFIRMED.

Edward Lee CLEMMONS, Plaintiff-Appellant,

v.

Dale BOHANNON, Robert Tanay, Herb Maschner, and Robert Mills, Defendants-Appellees.

No. 88-2730.

United States Court of Appeals, Tenth Circuit.

Oct. 9, 1990.

Rehearing and Rehearing En Banc Granted Nov. 14, 1990.

State prisoner brought civil rights action alleging, inter alia, violations of his constitutional rights arising out of involuntary subjection to environmental tobacco smoke. Summary judgment for defendants was granted by the United States District Court for the District of Kansas, Dale E. Saffels, J., and prisoner appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) exposing prisoner to unreasonable risk of debilitating or terminal disease offends "evolving standards of decency" protected by the Eighth Amendment; (2) relevant inquiry is whether long-term exposure to environmental tobacco smoke poses unreasonable risk of harm to an inmate's health; and (3) inmate's indefinite, involuntary exposure to environmental tobacco smoke in an eight-foot cell, by reason of involuntary double-celling with smokers, raised triable issue of fact as to whether such exposure created unreasonable risk to health.

Reversed and remanded in part and affirmed in part.

Tacha, Circuit Judge, filed a dissenting opinion.

1. Constitutional Law ⇐272(2)
Criminal Law ⇐1213.10(3)
Prisons ⇐17(2)

State prison policy of permitting indefinite double-celling of smokers with non-

90roc33

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF NEVADA, ET AL.,

Defendants.

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MAY 29 1990
U.S. ATTORNEY, LAS VEGAS, NV

CIVIL-S- 90-65-HDM

MINUTES OF THE COURT

DATE: May 23, 1990

PRESENT: HOWARD D. McKIBBEN U.S. District Judge

Deputy Clerk: Cliff Chamblee Reporter: Lesley Clarkson

Counsel for Plaintiff(s) Karen Egbert

Counsel for Defendant(s) Brian McKay and Harry Swainston

COURT CONVENES AT 11:30 A.M. & CONCLUDES AT 12:10 P.M.

~~MINUTE ORDER IN CHAMBERS~~

PROCEEDINGS: HEARING MOTION OF DEFENDANTS FOR STAY OF PROCEEDINGS (#8):

Hearing is held on the motion of defendants for stay of proceedings, or in the alternative, to dismiss.

Arguments made.

IT IS ORDERED that the motion for stay of proceedings filed on behalf of defendants (#8) is GRANTED, and this action is stayed pending final resolution of the action presently pending in the Ninth Circuit Court of Appeals, case number 90-70004.

Court directs counsel in this action to file pleadings regarding any action taken by the Ninth Circuit Court of Appeals.

A formal order from this Court will subsequently be filed.

CAROL C. FITZGERALD, CLERK

By: Cliff Chamblee
Deputy Clerk

Exhibit + DCE

90-5-2-2-9

D/C

DEC 1 , 1990

UNITED STATES DISTRICT CO
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF NEVADA, ET AL.,

Defendants.

CIVIL-S- 90-65-HDM (RJJ)

MINUTES OF THE COURT

DATE: December 14, 1990

PRESENT: HOWARD D. McKIBBEN U.S. District Judge

Deputy Clerk: Cliff Chamblee Reporter: Oma Rose-Recorder

Counsel for Plaintiff(s) Karen L. Egbert

Counsel for Defendant(s) Harry Swainston, Deputy Attorney General

COURT CONVENES AT 10:56 A.M. & CONCLUDES AT 11:20 A.M.

~~MINUTE ORDER IN CHAMBERS~~ TELEPHONE CONFERENCE CALL

PROCEEDINGS: HEARING MOTION FILED ON BEHALF OF DEFENDANT TO MAINTAIN STAY PENDING U.S. SUPREME COURT DECISION, ETC. (#22)

Hearing held and arguments made telephonically.

IT IS ORDERED that the stay in this action is lifted only for the plaintiff to file a motion for summary judgment, which will be considered filed as of this date; any opposition by defendants shall be filed no later than January 15, 1991, and any final reply shall be filed by January 25, 1991.

After all oppositions and replies are filed with respect to the motion for summary judgment, this matter shall stand submitted.

The stay in this action shall remain in effect for all purposes other than the issues for summary judgment.

CAROL C. FITZGERALD, CLERK

By: Cliff Chamblee
Deputy Clerk

cc Egbert, Gassaway

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